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No. 82-65

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARGARET R. BROWN, JUDY KNIGHT, JANE MAXWELL, MARY SHENEFIELD, MARIAM S. STRAUGHAN, SANDRA H. SHUPTRINE, OLIVE J. WHITE,

Appellants,

v.

THYRA THOMSON, as Secretary of the State of Wyoming, et al.

Appellees,

v.

JAMES L. THOMPSON, et al.,

Appellees-Intervenors.

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# MOTION TO AFFIRM

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## MOTION TO AFFIRM

### APPELLEES-INTERVENORS

Appellees-Intervenors, who include several Niobrara County residents and the Board of County Commissioners of Niobrara County, are as follows: James L. Thompson, Gerald D. Bardo, Russell Thompson, Kenneth A. Gropp, Richard G. Pfister, Peter M. Hansen, Gertrude Chamberlain, Betty Percival, Mary L. Burke, Board of County Commissioners of the County of Niobrara, Kenneth R. Freeman, as a County Commissioner of the County of Niobrara and in his individual capacity, F. Everett Brooks, as a County Commissioner of the County of Niobrara and in his individual capacity, and Louis L. Landkamer, as a County Commissioner of the County of Niobrara and in his individual capacity.

### OPINION BELOW

This case, Brown v. Thomson, is reported at 536 F.Supp. 780 (D. Wyo. 1982).

## ADDITIONAL STATUTORY PROVISIONS

Appellants set forth the provisions of Wyoming Statutes §28-2-109 (1981), the 1981 Apportionment Act, in their Jurisdictional Statement. However, they omitted the enabling clause in Chapter 76, Section 3 of the Session Laws of Wyoming, which Appellees-Intervenors hereby set forth:

> It is hereby declared the policy of this state is to preserve the integrity of county boundaries as election districts for the House of Representatives. The Legislature has considered the present population, needs, and other characteristics of each county. The Legislature finds that the needs of each county are unique and the interests of each county must be guaranteed a voice in the Legislature. The Legislature, therefore, will utilize the provisions of Article 3, Section 3 of the Wyoming Constitution as the determining standard in the reapportionment of the Wyoming House of Representatives which guarantees each county at least one representative. The Legislature finds that the opportunity for oppression of the people of this state or any of them is greater if any county is deprived a representative in the Legislature than if each is guaranteed at least one representative. The Legislature finds that the dilution of the power of counties which join together in making these declarations

is trivial when weighed against the need to maintain the integrity of county boundaries. The Legislature also finds that it is not practical or necessary to increase the size of the Legislature beyond the provisions of this act in order to meet its obligations to apportion in accordance with constitutional requirements consistent with this declaration.

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## INTRODUCTION

Appellants' Jurisdictional Statement is overreaching. They attempt to prop up a jurisdictional case by playing with such catch phrases as "dangerous trend," "violative of . . . constitutional rights if unchecked," "reversal in current apportionment law," and "spawning substantial regeneration of apportionment litigation."

Appellants are grasping at straws. Rather than a flaunting of this Court's apportionment decisions, the Memorandum Opinion of Judges William E. Doyle, Ewing T. Kerr and Clarence A. Brimmer and the Special Concurrence of Judge Doyle are straight-forward, well-reasoned and grounded solidly within the framework of this Court's apportionment decisions.

In view of the trial court's care in anchoring its decision to the apportionment guide-posts laid down by this Court, the questions raised by Appellants are so lacking in substance as not to need further argument.

## FACTUAL STATEMENT AND LEGAL ARGUMENT

Factual and legal issues markedly similar to those presented in this case were before this Court in 1966 in Harrison v. Schaefer, 383 U.S. 269, 86 S.Ct. 929, 15 L.Ed.2d 750 (1966) and were disposed of by a summary affirmance of Schaefer v. Thomson, 251 F.Supp. 450 (D. Wyo. 1965).

There is no more substance to the questions involved in this case than those raised and summarily disposed of sixteen years ago in Schaefer.

In Schaefer, a three-judge panel, which included Judge Kerr, held that the 1963 reapportionment of the Wyoming House of Representatives was not invidiously discriminatory.

Under the 1963 Reapportionment Act, the House of Representatives had 61 representatives. The State of Wyoming had a total population of 329,646. Niobrara County had one representative with a population of 3,750. The "official divisor" was 5,400 people. Four counties fell below the "official divisor" but each retained its own representative.

In Thompson v. Thomson, 344 F.Supp. 1378 (D. Wyo. 1972), the Court upheld the constitutionality of the 1971 reapportionment of the Wyoming House of Representatives. The Court found that the 1963 House reapportionment was not substantially altered by the 1971 Act.

The population of the State of Wyoming in 1971 was 332,416. The number of representatives was increased to 62. Niobrara County, with a population of 2,924, had one representative. The official divisor was 5,300. Five counties were below the official divisor and yet each retained its own representative.

Under the 1981 Reapportionment Act, the population of the State was 469,557. The number of representatives was increased to 64. Five counties, including Niobrara County, fell below the official divisor of 7,300 and each was given a representative.

The overall relative range of the 1963 House apportionment which was upheld in Schaefer v. Thomson, supra, and summarily affirmed by this Court in Harrison v. Schaefer, supra, was 90%. The overall

relative range of the 1971 House apportionment was 86%. The overall relative range of the 1981 House apportionment is 89%, a lower percentage than that summarily affirmed by this Court in 1966. However, Appellants attempt to circumvent the authority of this Court's summary affirmance in Schaefer by arguing that later cases have nullified the 1966 decision. Appellants rely on Gaffney v. Cummings, 412 U.S. 735, 37 L.Ed.2d 298, 93 S.Ct. 2321 (1973); White v. Regester, 412 U.S. 755, 37 L.Ed. 314, 93 S.Ct. 2332 (1973); Mahan v. Howell, 410 U.S. 315, 35 L.Ed.2d 320, 93 S.Ct. 979 (1973); and Connor v. Finch, 431 U.S. 407, 52 L.Ed.2d 465, 97 S.Ct. 1828 (1976).

Appellants' conclusory statements to the contrary, the later decisions cited by Appellants actually reinforce the summary affirmance in Harrison v. Schaefer, supra, and further render the issues involved here devoid of substance. Judges Doyle, Kerr and Brimmer appropriately noted that reapportionment plans are not stricken automatically because of a large deviation in overall relative range. The panel also acknowledged that

this Court has held that a deviation of more than 10 per cent requires that a rational state policy be established to justify a reapportionment. White v. Regester, supra; Mahan v. Howell, supra; Gaffney v. Cummings, supra. The trial court further noted that the rational justification standard is less stringent in state as opposed to Congressional reapportionment cases. Mahan v. Howell, supra.

In applying this Court's more recent apportionment decisions to the 1981 Wyoming House apportionment, the trial court appropriately relied on the language and rulings in Mahan and Gaffney.

The trial court emphasized Gaffney's acknowledgment that "representation does not depend solely on mathematical equality among district populations" and that "unrealistic overemphasis on raw population figures, a mere nose count in the districts, may. . . itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." Brown v. Thomson at 784.

The trial court noted this Court's specific ruling in Mahan that the policy of maintaining the integrity of political subdivision lines is a rational one. Id. at 783-784.

Cognizant of this Court's apportionment guidelines, the trial court reviewed extensive evidence, most of which was uncontroverted, and concluded that the 1981 Reapportionment plan (1) does take population figures into account, (2) has only a de minimis effect on the "dilution" of the Appellants' votes, and (3) has a rational policy basis which justifies the statistical deviations.

Without rehashing the trial court's analysis of the total statistical picture, as opposed to the isolated "overall relative range" figure which Appellants cite, Appellees simply note the finding that the .65 percent change in voting strength which Appellants would receive if Niobrara County were stripped of its sole representation in the state legislature is "trivial" and "insufficient to constitute invidious discrimination." Id. at 783.

The trial court further held that the statistical deviation in this case was justified by a showing that there is a rational state policy in maintaining the integrity of counties as political subdivisions in Wyoming and in the "unique" features of both Wyoming as a state and Niobrara County as an agency of the state government:

> Wyoming as a state is unique among her sister states. A small population is encompassed by a large area. Counties have always been a major form of government in the State. Each county has its own special economic and social needs. The needs of the people are different and distinctive. Given the fact that the representatives from the combined counties of Niobrara and Goshen would probably come from the larger county, i.e. Goshen, the interests of the people of Niobrara County would be virtually unprotected.
>
> The people within each county have many interests in common such as public facilities, government administration, and work and personal problems. Under the facts of this action, to deny these people their own representative borders on abridging their right to be represented in the determination of their futures.
>
> In Wyoming, the counties are the primary administrative agencies of

> the State government. It has historically been the policy of the State that counties remain in this position.
>
> The taxing powers of counties are limited by the Constitution and some State statutes. Supplemental monies are distributed to the counties in accordance with appropriations designated by the State Legislature. It comes as no surprise that the financial requirements of each county are different. Without representation of their own in the State House of Representatives, the people of Niobrara County could well be forgotten.

Brown v. Thomson at 784.

The trial court indicates at the beginning of its Memorandum Opinion, authored by Judge Kerr, that the issue in this case is a narrow one. It pertains to a single county and what the court characterized as "the relatively simple question" of whether or not the allocation of a representative to that county constitutes invidious discrimination. In deciding that question, the trial court was careful to follow the apportionment guidelines laid down by this court.

The trial court did not deviate in any way, shape or form from the constitutional voting requirements of the 14th Amendment.

Accordingly, the question on which this case depends is insubstantial. It does not involve the usurptious birth of a new trend in apportionment law or the threat of increased apportionment challenges.

Judge William E. Doyle filed a special concurring opinion which is helpful in its analysis of this court's apportionment decisions and the logical route by which it reaches the conclusion that the preservation of Niobrara County's sole representation in the State Legislature is not injurious to the remainder of the population of Wyoming and does not show even the "slightest sign" of discriminating against Appellants or any other group of people.

Judge Doyle finds the unique features of Wyoming as a state and Niobrara County as an element of the political structure within the state to be important factors in this case. He also appropriately notes that the apportionment plans which this court has condemned in the past were characterized by across the board substantial population differences, as opposed to the "single unit" over-representation in this case.

Judge Doyle, like Judges Kerr and Brimmer, finds that there is little to distinguish this case from this Courts' 1966 summary affirmance of the 1963 Wyoming House apportionment plan in Harrison v. Schaefer, supra: "and, therefore, one would be hard put to reach a different conclusion in this case without, in effect, overruling the Supreme Court's affirmance in the Schaefer case, a course we do not choose to follow." Brown v. Thomson at 788.

## CONCLUSION

In view of the fact that Judges Doyle, Kerr and Brimmer decided this case squarely within the cacoon of this Court's apportionment decisions, there is no substance to the questions raised by Appellants. The trial court's decision does not raise a red flag in the area of apportionment law and does not depart in any way, shape or form from constitutional protections or guarantees. Accordingly, this case, like Harrison v. Schaefer, supra, before it, is ripe for summary affirmance.

Respectfully submitted,

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## APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| MARGARET R. BROWN, JUDY KNIGHT, JANE MAXWELL, MARY SHENEFIELD, MIRIAM S. STRAUGHNAN, SANDRA H. SHUPTRINE, OLIVE J. WHITE, | ) | |
| Plaintiffs, | ) | |
| vs | ) | No. C81-292 |
| THYRA THOMSON, as Secretary of State of the State of Wyoming, ED HERSCHLER, THYRA THOMSON, SHIRLEY WITTLER and JAMES B. GRIFFITH, as members of the State Canvassing Board, and ED HERSCHLER, as Governor of the State of Wyoming, | ) | |
| Defendants, | ) | |
| JAMES L. THOMPSON, GERALD D. BARDO, RUSSELL THOMPSON, KENNETH A GROPP, RICHARD G. PFISTER, PETER M. HANSEN, GERTRUDE CHAMBERLAIN, BETTY PERCIVAL, MARY L. BURKE, BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF NIOBRARA, KENNETH R. FREEMAN, as a County Commissioner of the County of Niobrara and in his individual capacity, and LOUIS L. LANDKAMER, as a County Commissioner of the County of Niobrara and in his individual capacity, | ) | |
| Intervening Defendants. | ) | |

Sue Davidson and Edwin H. Whitehead of the firm Urbigkit & Whitehead, Cheyenne, Wyoming, appearing as counsel for plaintiffs.

Steven F. Freudenthal, Attorney General for the State of Wyoming, Peter J. Mulvaney, Deputy Attorney General for the State of Wyoming, and Randall T. Cox, Assistant Attorney General for the State of Wyoming, appearing as counsel for defendants.

Richard J. Barrett of the firm Hathaway, Speight and Kunz, Cheyenne, Wyoming, appearing as counsel for intervening defendants.

MEMORANDUM OPINION

Before DOYLE, Circuit Judge, KERR and BRIMMER, District Judges.

KERR, District Judge

Plaintiffs have filed this action challenging the constitutionality of the 1981 Reapportionment Law allocating a representative to Niobrara County and Section 3 of Article 3 of the Wyoming State Constitution. Section 3 provides that "each county shall constitute a. . .representative district. . .each county shall have at least. . .one representative." Jurisdiction is based upon 28 U.S.C. §1343 (3) and (4). A three-judge court was convened pursuant to 28 U.S.C. §2281 to hear this action.

The issue here involved a narrow one and the action can hardly be described as one of first impression for this Court. For the fourth time, this Court is considering the question of the constitutionality of a reapportionment law enacted by the State legislature. Schaefer v. Thomson, 240 F.Supp. 247 (D. Wyo. 1964); Schaefer v. Thomson, 251 F.Supp. 450 (D.Wyo. 1965); Thompson v. Thomson, 344 F.Supp. 1378 (D. Wyo. 1972).

At issue before the Court is the relatively simple question of whether or not the allocation of a representative to Niobrara County constitutes invidious discrimination and, as such, is unconstitutional.

The relevant facts are simple and not in dispute. The parties have agreed to some of the facts in the form of a stipulation and the evidence presented by both parties to the Court was, for the most part, uncontroverted.

Niobrara County is the least populous of Wyoming's 23 counties with a population of 2,924 people in a state containing 469,557 people. Under the 1981 Reapportionment Act, Niobrara County was allocated its own representative in the State House of Representa-

tives. Niobrara County has had its own representative since its creation in 1913, some 69 years.

Plaintiffs urge that this Court should find that such an allocation is unconstitutional and that Niobrara and neighboring Goshen County should be combined to form one representative district. Defendants and Intervenors take the opposite position and claim that the statistical difference in allocating a representative to Niobrara County is insignificant and that any statistical discrepancies are more than outweighed by a rational State interest in the current reapportionment.

In Schaefer v. Thomson, 521 F.Supp. 450 (D.Wyo. 1965), this Court was called upon to analyze the reapportionment, or lack thereof, of the State legislature. We found it necessary to reapportion the State Senate, but held that the reapportionment of the State House of Representatives was not invidiously discriminatory:

> We reiterate our previous opinion that the Wyoming Reapportionment Act of 1963 (Chpater 22, Session Laws of Wyoming, 1963) is not an

> invidious discrimination insofar as it provides for representation in the State House of Representatives and in that respect it does not violate the Fourteenth Amendment to the United States Constitution.

The Schaefer case was affirmed by the Supreme Court in 1966. Harrison,et al. v. Schaefer, et al., 383 U.S. 269 (1966). Under the 1963 Reapportionment Act, the House of Representatives had 61 representatives. The State of Wyoming had a total population of 329,646. Niobrara County had one representative with a population of 3,750. The "official divisor" was 5400 people. Four counties fell below the 5400 level, Crook, Niobrara, Sublette and Teton, but each still had its own representative.

In 1972, this Court was again called upon to evaluate another legislative reapportionment scheme. In upholding the constitutionality of the 1971 Reapportionment Law, this Court stated:

> It seems best at this point to dispose of the issue concerning the alleged unconstitutionality of the reapportionment of the House of Representatives. The Act made only five minimal adjustments to the 1963 Reapportionment of the House, which had previously been found

> constitutional by this Court and affirmed by the United States Supreme Court. The changes increased by one the number of representatives in two districts. These changes all reflected population variations.
>
> We are of the opinion that the reapportionment of the House by the 1971 Act does not constitute invidious disrimination for the reason that the 1963 reapportionment of the House was not substantially altered and, therefore, the 1971 Act does not abridge the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

At the time of the 1971 Act, the population of the State was 332,416. The number of representatives was increased to 62 and the official divisor was 5300. There were some shifts in population and representatives were changed to reflect said shifts. Five counties, Crook, Hot Springs, Niobrara, Sublette and Teton, were all below the official divisor in population and yet each received a representative in the House under the 1971 Act. Niobrara County had a population of 2,924 at that time.

Under the 1981 Reapportionment Act now before the Court, the population of the State

is 469,557 and the official divisor is 7300. Once again, five counties, Crook, Hot Springs, Niobrara, Sublette and Teton, fall below the population level of the official divisor. Each was given a representative under the 1981 Law. Changes were made to reflect shifting population figures in some of the impacted counties. The number of representatives was increased to 64. None of the changes in the 1981 Law were challenged herein with the exception of the allocation by the legislature of a representative to Niobrara County.

One of the factors to be considered in reapportionment cases involved statistical analysis of the relevant figures. In White v. Regester, 412 U.S. 755 (1973), the Supreme Court held that a deviation of more than 10 percent requires that a rational state policy be established to justify the reapportionment. See also, Mahan v. Howell, 410 U.S. 315 (1973); Gaffney v. Cummings 412 U.S. 735 (1973).

Initially, the 89 percent relative range figure would appear to conclusively establish a prima facie case and possibly invidious

discrimination in the 1981 Reapportionment Law. A close examination of the other relevant statistics, however, soon reveals the fallacy of relying upon only one statistic. Utilizing only the overall relative range figure distorts the picture.

The population differential in Niobrara County between the 1965 court-ordered reapportionment, as affirmed by the Supreme Court, and the 1981 Reapportionment Law is the difference between 3,750 and 2,924, or 826 people.

Statistically, the "dilution" of the plaintiffs' votes is de minimis when Niobrara County has its own representative. The improvement overall with the representative deleted ranges from 0.0003 in Teton County to 0.0023 in Laramie County. Such minor improvement hardly reaches the level of significance.

In this action, we do not have a small percentage of the population electing a large number of representatives as was the case in the Senate in Schaefer v. Thomson, 521 F. Supp. 450 (D.Wyo. 1965). If Niobrara County continues to have its own representative,

46.65 percent of the population would elect 33 of 64 representatives. Thus, 46.65 percent is the minimum population which could elect a majority of House members. This figure is comparable to the minimum population percentage of 47.52 percent electing 53.33 percent of the Senate seats in the 1965 Schaefer v. Thomson decision.

Alternatively, when considering the counties in which the plaintiffs reside, the Court finds that these seven counties elect 28 out of 64 representatives or 43.75 percent. The seven counties contain 46.3 percent of the total state population utilizing the 1980 censue figures. Comparatively, if plaintiffs' plan is adopted and Niobrara County does not have its own representative, the seven counties in which plaintiffs reside would elect 28 representatives out of 63 or 44.4 percent of the House of Representatives. Statistically, a .65 percent change is trivial but, more importantly, such a percentage is insufficient to constitute invidious discrimination. Rather, the effect on plaintiffs is best described as de minimis.

The overall changes that have been made since this Court last considered this issue have not been of sufficient magnitude to constitute invidious discrimination.

The statistician who appeared before the Court was clear and emphatic when he stated that there was no statistically significant change in the relevant figures when the plan allocating a representative to Niobrara County was compared with a plan which combined Niobrara County with Goshen County, thus eliminating Niobrara County's representative.

Reapportionment plans are not stricken automatically because of a large deviation. Rather, upon such a showing, the burden of proof shifts to the state to establish a rational justification and state policy for the deviation. The standard to be applied is less stringent than in Congressional reapportionment cases. Mahan v. Howell, supra.

In Mahan, the Supreme Court clearly stated that a state reapportionment plan must consider population figures but that deviations could be justified by legitimate state

interests provided that invidious discrimination is not the end result:

> We conclude, therefore, that the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that Kirkpatrick and Wells make applicable to congressional reapportionment, but instead by the equal protection test enunciated in Reynolds v. Sims, supra. We reaffirm its holding that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 377 U.S. at 577. We likewise reaffirm its conclusion that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." Id. at 579.
>
> The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one. It can reasonably be said, upon examination of the legislative

plan, that it does in fact advance that policy.

In Gaffney v. Cummings, supra, the Supreme Court expanded its discussion on role of population figures in determining the reapportionment:

> More fundamentally, Reynolds recognized that "the achieving of fair and effective representation for all citizens is. . .the basic aim of legislative apportionment," Id. at 565-566, and it was for that reason that the decision insisted on substantial equality of populations among districts.
>
> This is a vital and worthy goal, but surely its attainment does not in any common sense way depend upon eliminating the insignificant population variations involved in this case. Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. See Mahan v. Howell, supra; Abate v. Mundt, 403 U.S. 182 (1971); Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Board of Education, 387 U.S. 105 (1967); Burns v. Richardson, supra. An unrealistic overemphasis on raw population figures, a mere nose count in the

districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement. [Emphasis added].

Both the State defendants and the intervening defendants have established a rational policy basis which justified the statistical deviations which exist under the 1981 Reapportionment Law.

Wyoming as a state is unique among her sister states. A small population is encompassed by a large area. Counties have always been a major form of government in the State. Each county has its own special economic and social needs. The needs of the people are different and distinctive. Given the fact that the representatives from the combined counties of Niobrara and Goshen would probably come from the larger county, i.e. Goshen, the interests of the people of Niobrara County would be virtually unprotected.

The people within each county have many interests in common such as public facilities, government administration, and work

and personal problems. Under the facts of this action, to deny these people their own representative borders on abridging their right to be represented in the determination of their futures.

In Wyoming, the counties are the primary administrative agencies of the State government. It has historically been the policy of the State that counties remain in this position.

The taxing powers of counties are limited by the Constitution and some State statutes. Supplemental monies are distributed to the counties in accordance with appropriations designated by the State Legislature. It comes as no surprise that the financial requirements of each county are different. Without representation of their own in the State House of Representatives, the people of Niobrara County could well be forgotten.

It is the opinion of this Court that the allocation by the State Legislature of a representative to Niobrara County in the 1981 Reapportionment law is not unconstitutional.

The allocation is not statistically significant and does not constitute invidious discrimination. Under the 1981 Reapportionment Law, the integrity of political boundaries remains intact while a rational State policy continues to be maintained as it has been since 1913 in Niobrara County.

This Memorandum Opinion constitutes the Findings of Fact and Conclusions of Law and additional findings and conclusions are unnecessary.

An Order will be entered dismissing the Complaint with prejudice. Each party is to pay their own costs.

Dated this 21st day of April, 1982.

/s/William E. Doyle
United States Circuit Judge

/s/Ewing T. Kerr
United States District Judge

/s/Clarence A. Brimmer
United States District Judge

DOYLE, Circuit Judge - SPECIAL CONCURRENCE

I concur in both the result and the reasoning given by Judge Kerr in his opinion. I have prepared a supplemental opinion not because of any difference that I have, but rather to express my own conclusions based upon the study of the record and of the cases.

As Judge Kerr said, the issue here is whether the action of the legislature in enacting the reapportionment statute was in error because it gave to Niobrara County a representative, even though its population did not justify it. Wyoming has a Constitutional provision, §3 of Article III, of the Wyoming State Constitution, which provides that "each county shall constitute a representative district* * *each county shall have at least* * *one representative."

Jurisdiction herein arises under 28 U.S.C. §1232(3) and (4). A three-judge court was convened pursuant to 28 U.S.C. §2284 to hear this action.

The issue involved is, as indicated above, a somewhat narrow one. It pertains to

a single county. The Legislature sought to follow a formula provided by Wyoming Statute §28-2-109(9)(ii). It reads as follows:

> The rates for the apportionment of the representatives is the smallest number of people per representative which when divided into the population in each representative district as shown by the official results of the 1980 federal decennial census with fractions rounded to the nearest whole number results in a house with sixty-three (63) representatives.

Section 3 of Article III really requires that the reapportionment be carried out county by county. The average population for a representative was determined to be 7,377. As to every county in Wyoming except Niobrara it was possible to come very close to carrying out the ideal in accordance with the representative number. A bona fide effort was made to farily arrive at each solution in accordance with the formula. The result was about as fair and equal as was possible. To be sure, there were some counties which were slightly over-represented and some which were to a slight degree under-represented, and Niobrara is the only county which could be

regarded as being substantially over-represented, because its population was shown to be 2,924. An effort was made to follow out the preceding history by awarding a representative to Niobrara County. It had held its own from the 1971 census to the present time, the population remaining at 2,924. During previous years it had been a more populous county, and also one ripe in minerals, and productive in farming and ranching. However, since the sixties there have been some population changes, and these changes have left Niobrara with a relatively small population considering its size and importance, in relationship to the representation number of 7,337.

As we have noted above, each county has traditionally been a representative unit, and, indeed, this approach has been approved by the Supreme Court. Harrison v. Schaefer, 383 U.S. 269 (1966). Five counties, Crook, Hot Springs, Niobrara, Sublette and Teton, were all over-represented, but Niobrara had a lower population for the official divisor than the others. The Wyoming Legislature recognized this, and it raised the number of representatives from 63 to 64 in order to

give Niobrara the representation that it had previously had. In the other counties where the population was below the divisor each received one representative, notwithstanding that it resulted in their being slightly over-represented.

The only result which is attacked by the plaintiffs is Niobrara, because, I suppose, the numerical difference is great. The over-representation is noteworthy.

But it strikes me that no one has suffered discrimination as a result of this. If a representative had been taken away from one of the other counties in order to give Niobrara one, it would be a different matter. Someone would have suffered. On the other hand, inasmuch as the Legislature created a new additional representative, rather than taking away one or more, the result was a total of 64 rather than 63. As a result of this, no county suffered, and no one can claim that he or she was injured. Niobrara was benefited, but no corresponding injury flowed from the action. Every other county comes very close to fair and equitable representation.

If the numbers approach were to be followed religiously it would mean that one single county would have to relinquish representation. Represented districts would have to be merged in order to satisfy the one-man, one-vote formula. As Judge Kerr has indicated in his opinion this would upset the representation by county approach that has been historically followed in Wyoming. It would result in inequity in terms of one county having no representation whatsoever, and all other counties having at least one representative. This would result in others having all the representation. This could result in a populous county being paired nearer this representative district with a small county. The large county would dominate the election.

Wyoming has good reasons for clinging to the county as a representative district because this insures that the pecular needs of each and every county can be represented in the Legislature. Although this might not carry out fully the equality of numbers of voters within the various election districts it comes close enough to be roughly fair.

The Legislature posed an alternative, and that was that if the one representative in Niobrara County plan was held to be invalid, that Niobrara would be placed in an election district with neighboring Goshen County, which has a population of 12,040, and has two representatives. Thus, the result of this would be that Goshen's representatives would be assigned the task of representing Niobrara County, also. The consequence would be that Niobrara would not have its own representative.

In the case of Reynolds v. Sims, 377 U.S. 533 (1964), the Supreme court found the reapportionment of the Alabama Legislature to be unconstitutional where the ratio between population in the largest Senate district to the smallest was 41 to 1, and the ratio between the largest and the smallest House district was 15 to 1. As a result of the reapportionment, a small minority of the population, 25.7% was allowed to elect a majority of the representatives, and 25.1% to elect a majority of the members of the Senate. Reynolds established that both houses of the state legislature have to be apportioned so

that the districts are as near to equal population as is practical. The Court stressed, however, that "mathematical exactness or precision" is not required. Id. at 577. There must be substantial compliance with the goal of population equality. The Reynolds Court also held that a state may rationally consider according to political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Id. at 580. The Court there pointed out that "carried too far, a scheme giving at least one seat in one house to each political subdivision (for example, to each county), could easily result, in many states, in a total subversion of the equal population principle." Id. at 581. That latter possibility is not present, of course, in the case at bar.

One of the recent cases in which the Supreme Court has determined the presence of invidious discrimination is Swann v. Adams, 385 U.S. 440 (1967), wherein the Court held that a variance of 25.65% in one house of the Florida legislature, and 33.55 % in the other

was impermissible, "absent a satisfactory explanation grounded on acceptable state policy." Id. at 444.

Kilgarlin v. Hill, 386 U.W. 120 (1967), invalidated a state plan, too. There the Court held that the 1965 Texas reapportionment statute was invalid. The plan provided that districts varied from 14.84% over-represented to 11.64% under-represented, for a total deviation of 26.48%, with the ratio between the largest and the smallest districts being 1.31 to 1. There again it was said this was presumptively invalid.

Whitcomb v. Chavis, 403 U.S. 124 (1971), held that where there was a maximum variance in population of Indiana Senate seats of 28.20%, with the ratio between the largest and the smallest districts of 1.372 to 1., and the maximum variance in house districts of 24.78% with a ratio of 1.279 to 1, the apportionment plan did not comply with the requirements of the equal protection clause. None of the above cited cases govern the present situation involving as it does a single county which has received a benefit, namely representation.

The more recent case of Mahan v. Howell, 410 U.S. 315 (1973), is relied on by both sides. The reapportionment of the Virginia House of Delegates was challenged as being in violation of the Equal Protection Clause of the Fourteenth Amendment because there were impermissible population deviations of 16.4%. It was held in Mahan that this variation was not excessive. It resulted from Virginia's rational objective of preserving the integrity of political subdivision lines. The Mahan Court relied on Reynolds for the point that more flexibility is afforded to states in legislative reapportionment than is allowed in congressional redistricting. Such flexibility was ruled in Mahan to be constitutionally permissible for the reason that there are a larger number of seats in the state legislative body to be distributed than in congress, and as a result it may be possible for a state to use political subdivision lines to a greater extent in establishing state legislative districts.

The more stringent standards of Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and Wells v. Rockefeller, 394 U.S. 542

(1969), were rejected. Instead, the Court reaffirmed the Reynolds doctine, "that as long as the divergences are based on legitimate considerations incident to the effectuation of a rational state policy, some deviation from the equal population principle are permissible* * *." Mahan, supra at 325. The 16% deviation which was approved in Mahan is a good deal less than the percentage deviations that were found to be invalid in the previous decisions of the Supreme Court. It was acknowledged that the percentage deviation approved in Mahan "may well approach the tolerable limits; we do not find it exceeds them." Id. at 329.

Gaffney v. Cummings, 412 U.S. 735 (1973), and its companion, White v. Regester, 412 U.S. 755 (1973), also define standards for reapportionment. In Gaffney, the maximum deviation is 7.83% and in White, 9.9%. In both cases, the Court concluded that there was no violation of equal protection, and that such minor deviations did not make out a prima facie case of invidious discrimination.

Gaffney stands for the proposition that the aim of legislative apportionment is fair and effective representation for all citizens. Id. at 748. It was acknowledged that this could be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely upon mathematical equality among district populations; other relevant factors are to be considered, as well as important state interests. The question that is to be asked in order to comply with the decision in Gaffney is will this plan deprive any person of fair and effective representation in the state legislature.

In White the Court said "[W]e do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation." Id. at 764.

This brings us back to the present case and the disproportion in a single district. Is it injurious to the remainder of the population of Wyoming? No discomfort is apparent

as a result of giving the people of Niobrara County the sorely needed representation. It finally is to be noted and concluded that there is not the slightest sign of any group of people being discriminated against here. There is no indication that the larger cities or towns are being discriminated against; on the contrary, Cheyenne, Laramie, Casper, Sheridan, are not shown to have been suffered in the slightest degree. There has been no preference for the cattle-raising or agricultural areas as such.

In reading the decisions of the Supreme Court, one tends to conclude that the apportionment cases differ on their facts, and Wyoming is certainly no exception. Its problems are different from those which are present in most every other state in the union. Geographically it is large, but population-wise, it is relatively small, although it is growing. There were substantial differences in many of the plans that were condemned, but these were across the board and were not present in a single unit, as here. Cf. Connor v. Finch, 431 U.S. 407 (1977); Roman v.

Sincock, 377 U.S. 695 (1964), 710; Reynolds v. Sims, supra, 337 U.S. 533 (1964).

In Connor, supra, the result might very well have been different had Mississippi taken pains to call attention to the unique features in the political structure sufficient to justify more than de minimus variations.

The defendants in the case at bar rely heavily on the fact that prior Wyoming reapportionment plans have been upheld, and it is true that the 1963 plan, outlined in 251 F.Supp. 450 (D.C. Wyo. 1965), was affirmed by the Supreme Court, sub nom. in Harrison v. Schaefer, 383 U.S. 269 (1966). There is little to distinguish the 1966 case from the present case, and therefore, one would be hard put to reach a different conclusion in this case without, in effect, overruling the Supreme Court's affirmance in the Schaefer case, a course which we do not choose to follow.

In conclusion, after having heard the evidence and after having reviewed it, together with the well reasoned opinion of Judge Kerr, I see good reasons for concurring

in the opinion of Judge Kerr, and in denying the relief which has been sought by the plaintiffs, i.e., judicial reapportionment of the several counties in the state. The legislative reapportionment by the Wyoming Legislature was generally fair and equitable. The representation for Niobrara County did not injure the other counties. The representation given to Niobrara was accomplished by adding one more representative than had been planned. The result was not discriminatory nor invidious.

One further thought: The Legislature's alternative reduction of the number of members by one, and the combining of Niobrara County with Goshen County, while it might satisfy the numbers, is not, in any other respect, an attractive option.

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## CERTIFICATE OF SERVICE

I, Richard Barrett, the attorney for Niobrara County, Appellees-Intervenors herein, hereby certify that on the 11th day of August, 1982, I served copies of the foregoing Motion to Affirm on the parties hereto as follows:

1. On Appellants, by mailing copies in a duly addressed envelcpe, with postage prepaid, to Sue Davidson, attorney for Appellants, 504 West 17th Street, Suite 300, Cheyenne, Wyoming 82001.

2. On Appellees-State Officials, by mailing copies in a duly addressed envelope, with postage prepaid, to Steve Freudenthal, Attorney General, State of Wyoming, Capitol Building, Cheyenne, Wyoming 82002, attorney for Appellees-State Officials.

Richard Barrett
Attorney for
Appellees-Interventors

STATE OF WYOMING )
) ss.
COUNTY OF LARAMIE)

The foregoing Certificate of Service was acknowledged before me this 11th day of August, 1982, by RICHARD BARRETT.

Sharon L Bailey
Notary Public

My Commission Expires:
April 7, 1985